

Federal Court



Cour fédérale

Date: 20120711

Docket: IMM-7302-11

Citation: 2012 FC 873

Ottawa, Ontario, July 11, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

HAGOS GHEBREMICHAEL

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This case turns on the identity of the applicant. The Refugee Protection Division of the Immigration and Refugee Board found that the applicant had failed to provide acceptable documentation to establish his identity and failed to provide a reasonable explanation for the lack of such documentation or the steps taken to obtain the evidence.

[2] The sole issue is whether the board's identity finding was reasonable. For the reasons that follow, I conclude that it was not and remit the matter for reconsideration by a differently constituted panel.

[3] The applicant, Hagos Ghebremichael, claims to be a citizen of Eritrea. He was born in Dire Dawa, Ethiopia, but is unsure of his nationality. He believes that his mother was Somali and his father Eritrean. He claims to be Eritrean by tradition through his father. Following his father's death his mother took him to live in Djibouti with a paternal uncle. Following her death, he lived with that uncle, who abused him, and in the streets of Djibouti. He claims to have been arrested a number of times by the police for not having any identification papers. He would be detained and eventually released when neither the Ethiopian nor the Eritrean authorities would accept him.

[4] When the applicant had saved sufficient funds, he travelled with the help of a smuggler to Sudan in May 2008, then to Libya, Italy and finally to Norway in October 2008. He claimed refugee status in Norway but his claim was denied. He then travelled to Canada and arrived on September 3, 2010. He claimed refugee status at the port of entry. He was denied entry and detained due to a lack of identification as he had traveled to Canada with a false passport.

[5] While in detention, the applicant contacted his uncle in Djibouti to obtain identity documents. The uncle procured a birth certificate purportedly issued by the Town Council of Dire Dawa. It was sent directly to Citizenship and Immigration Canada. The certificate, issued on August 15, 2008, indicates that the applicant is of Eritrean nationality. It contains a number of spelling mistakes, including the name of the town.

[6] At the hearing before the Refugee Protection Division in August 2011, the Board Member found, on a balance of probabilities, that the birth certificate is not a genuine document. That finding

is not disputed in these proceedings. The applicant says he does not know how his uncle acquired the document.

[7] The Member noted that the applicant had amended his PIF to correct a mistake in the spelling of his mother's name. The Member further noted that it was reasonable to expect the applicant to have documentation on his identity since it constituted the central issue of his refugee claim in Norway.

[8] The Member did not refer to two additional documents submitted by the applicant: a letter from the Kingdom Priests International Church in Djibouti which referred to the applicant as having attended services and the affidavit of a Toronto resident who deposed that he had known the applicant's father and knew his nationality.

[9] Identity is a question of fact and thus attracts a standard of reasonableness: *Wang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 969 at para 22; and *Lin v Canada (Minister of Citizenship and Immigration)*, 2006 FC 84 at para 8.

[10] It is apparent from the transcript of the Board hearing that the applicant had difficulty understanding questions put to him through an interpreter. The questions had to be repeated several times at his request which appears to have caused the Board Member some frustration. The interpreter explained that the applicant was merely asking for clarification.

[11] When asked if he had tried to obtain other identity documents, the applicant testified that he went to the Eritrean Embassy and that they refused to help him. When the Member asked where the Eritrean Embassy was located the applicant said “can I see the address, it is in my pocket?” The Member did not respond to that but asked which city he went to. The applicant said “It is in Toronto”. The Member replied “In Toronto? Okay.” The Member drew from this an adverse inference that the applicant did not attend the Eritrean Embassy, because if he had, he would have known its location.

[12] I take judicial notice that the Eritrean Embassy is located in Ottawa. I expect the Member was also aware of that. It was unreasonable for the Member to have interpreted this brief exchange with the applicant as a failure to provide an explanation or to demonstrate reasonable diligence to obtain documentation. There is an Eritrean Consulate in Toronto and it is not surprising that the claimant, with little education, and testifying through an interpreter might describe it as an Embassy. Moreover, it is clear that the applicant had the address on his person and could have easily produced it at the hearing. He did not “volunteer” to get the information as the Member characterized this exchange in his reasons.

[13] In *Kalu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 400 at paragraph 12, Justice Dawson, then a member of the Federal Court, stated that:

In my view, the Board, as a specialized tribunal, failed to have proper regard to the evidence available to it to explain the difficulties inherent in obtaining identity documents for persons in the situation of Macauley and his designated representative. By failing to have that regard, the Board's conclusions that no reasonable efforts had been made to obtain identity documents and that no reasonable explanation had been provided for that failure were made in reviewable error.

[14] I have reached the same conclusion in this matter. Having never lived in a situation where he had legal status since leaving Ethiopia as a child, it would have been exceptionally difficult for the applicant to obtain official documents to prove who he is. The applicant had only the questioned birth certificate provided by a third party (his uncle) and a few other documents, including the affidavit, indicating that he is who he claims to be and that his father was indeed Eritrean. Even then, the question of his citizenship would be complex as Eritrea was not independent at the time of his father's death and has refused to acknowledge the applicant. The Member gave these difficulties no apparent consideration.

[15] The documents submitted by the applicant include UNHCR documents on the citizenship of persons in Ethiopia with parents from different origins, psychological and psychiatric reports on the applicant's mental status and other documents corroborating the applicant's seemingly consistent story. It is clear, considering the evidence before it, that the Board Member did not consider the particular situation of the applicant in evaluating if he was reasonably diligent in seeking documentation and if he had a reasonable explanation for not having it. The transcript of the brief hearing also demonstrates that the Member did not make any real effort to consider the applicant's circumstances.

[16] Certain of the evidence put before the Board, such as the affidavit of Theodros Michael Bockru, does not appear to have been considered. The affidavit, if accepted, corroborates the applicant's belief about his father's origins. It was open to the Board to find this evidence inconclusive, but it is not mentioned in the reasons. As stated by Justice Layden-Stevenson, then a member of this Court, in *Lin*, above, at paragraph 14:

...It was unquestionably open to the RPD to determine that identity had not been established. However, to arrive at that conclusion, it must, first, have considered the totality of the evidence before it. It does not appear to me that the RPD did that. If it did, it is not evident from its reasons. In either case, the board's decision is patently unreasonable because I am unable to conclude that it was made on the basis of the material that was before the RPD member. Consequently, the decision must be set aside.

[17] As in *Lin*, it was unquestionably open to the Board to find that the applicant's identity had not been established particularly in light of its reasonable finding that the birth certificate was false. Nonetheless, it had an obligation to consider all of the evidence before it and it is not apparent from the record that it did. In light of the cursory examination of the identity question disclosed by the transcript, this is not a case in which I am prepared to assume that the Board considered all of the evidence that it does not specifically refer to. Nor am I prepared to supplement the Board's reasons by my own review of the record.

[18] In the result, I do not find that the Board's decision regarding identity is reasonable as it lacks justification, transparency and intelligibility with regards to the facts of the matter. The Board's analysis on whether there was a reasonable explanation for the lack of documentation and reasonable diligence in obtaining identity documents is clearly not based on the evidence.

[19] No questions were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted and the matter is remitted to the Board for reconsideration by a differently constituted panel. No questions are certified.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7302-11

STYLE OF CAUSE: HAGOS GHEBREMICHAEL
and
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 3, 2012

REASONS FOR JUDGMENT: MOSLEY J.

DATED: July 11, 2012

APPEARANCES:

Paul VanderVennen FOR THE APPLICANT

Bridget O'Leary FOR THE RESPONDENT

SOLICITORS OF RECORD:

PAUL VANDERVENNEN FOR THE APPLICANT
VanderVennen Lehrer
Toronto, Ontario

MYLES J. KIRVAN FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario